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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Proposal for a Council decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland - Comments from the delegations

Following the Informal meeting of the Asylum Working Party on 19 January 2022 and the meeting of JHA Counsellors on 26 January 2022, delegations will find attached a compilation of replies received from Member States on the abovementioned subject.

Asylum Working Party

Written comments submitted by the Member States

**on the Proposal for a Council decision on provisional emergency measures for the benefit of
Latvia, Lithuania and Poland**

following the meeting of the Asylum Working Party on 19 January 2022

and the JHA Counsellors meeting on 26 January 2022

(14692/21)

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AUSTRIA

Article 6 (EBCG)

- Para. 3 lit. d: Monitoring social media is essential in this context. In addition, to the surveillance approach, there should also be a component of interactive, rapid and flexible response, which is carried out through information measures on social media.

Article 7 (EASO)

- As discussed during the meeting it would be necessary to refer to the EUAA, which was established on January 19th instead of EASO.
- As also brought forward, the scope of the possible EUAA support regarding „*providing applicants or potential applicants of international protection with information and specific assistance that ~~they may need~~*” in lit g. should be further clarified. For example “*information and specific assistance that **is foreseen by law.***”

Article 9 (Cooperation and assessment)

- In Par. 3 it should be clarified how the monitoring is conducted and how often the benefitting Member States have to provide the relevant information.

Article 10 (Entry into force and application)

- It could be discussed if it makes sense to exclude persons that have arrived from Belarus, where the asylum application has already been registered or where a return procedure has already been initiated.
- The retroactive application should be as broad as possible, so that third country nationals that arrived at the beginning of the crisis are also included in the emergency measures.

Recitals:

- Recitals do not address the issue of secondary migration, which is also a consequence of mass influx by third-country nationals (e.g. 10,000 arrivals in DE with connection to PL-BY border). This issue needs to be recognized; measures against secondary movements, like obligatory border procedures including limitations of movement, are important. AT suggests the following modification of recital (5):

“(5) [...] These actions show a determined attempt to create a continuing and protracted crisis as part of a broader concerted effort to destabilise the European Union and undermining society and key institutions. **They represent a real threat, present danger to the Union’s security and often result in secondary movements to other Member States.** “

- Although AT understands the reactive character of this implementing decision, the recitals should mention that the MS are also aiming to prevent further instrumentalizations in the future and reducing the primary migratory pressure by taking preventive measures in the external dimension of migration (e.g. cooperation with safe third countries, information campaigns in countries of origin/transit).

Following JHA Counsellors meeting on 26 January 2022;

Proposal for recital 5:

« [...] These actions show a determined attempt to create a continuing and protracted crisis as part of a broader concerted effort to destabilise the European Union and undermining society and key institutions. They represent a danger to the Union's security and stability and are prone to significantly undermine the effective management of migration in the whole Union, in particular by provoking unanticipated pressures of secondary movements. This also puts affected Member States under additional burden and responsibilities, and emergency measures need to provide appropriate, effective and swift assistance and available solutions to prevent secondary movements, further creating a destabilizing effect. »

THE CZECH REPUBLIC

The Czech Republic appreciates the possibility to share the written comments regarding above mentioned proposal. We would like to reiterate our readiness to agree with the legislative proposal if fully in line with the needs of the Member States concerned.

Please find bellow our main comments:

- **Articles 6-8** – these articles describe cooperation and support by EU agencies to MSs concerned, therefore these MSs should primarily determine parameters of the support provided by EU agencies.
- **Article 9 (2)** – in our view, this paragraph does not bring much added value, therefore we suggest its deletion. Moreover, CZ agrees with comments raised by LV and LT during the meeting that the MSs concerned already comply with their international obligations and the presence of the second paragraph seems to indicate otherwise.
- **Article 10 (3)** - CZ is of the opinion that the proposal should better define the **personal scope**, i.e. to what specific groups of third country nationals the proposal shall apply. The personal scope is unclear and the comment raised by AT proves its ambiguity.
- **Recital 4** – CZ supports the comment raised by ES that we should avoid specific numbers and formulate the recital in more general terms, because the situation develops rapidly, therefore the numbers will never be up-to-date.
- **Recital 14** – CZ supports comment raised by PL that the word *stranded* is misleading. These are not “stranded” migrants, but irregular migrants. We should look for better on point expression.
- **Recital 30** – this recital, in other words, states that the MSs concerned should comply with their international obligations, therefore there is no need to have it in the text.

GERMANY

We maintain our general scrutiny reservation subject to a political decision on the proposal and refer to our general comments in the written comments to the meeting on 7 January 2022, which we uphold.

In accordance with the explanations of the Presidency, we consider a clarification in the text useful, which stipulates that Belarusian nationals are not affected by the proposal.

Recitals

- **Recital 4:** At the appropriate time, an update of the figures would be necessary. Then the conditions of Art. 78 (3) TFEU would have to be examined conclusively once again.
- **Recital 15:** We thank for the clarification that „may include all measures necessary“ does not mean a further deviation from what is regulated in the Articles. However, we consider it necessary to insert an explicit clarification in the recital.
- **Recitals 16 to 18, 22:** We welcome that the emergency measures are of a temporary, extraordinary and exceptional nature and apply with full respect to fundamental rights and the guarantees set out in the Asylum Procedures Directive and the Reception Conditions Directive in relation to applicants with special needs or vulnerabilities; in particular, we welcome the reference to Art. 24 (3) Asylum Procedures Directive, from which the present proposal shall not deviate.
- **Recital 23:** We welcome the clarification regarding the ultima ratio principle in the application of detention and the reference to Art. 8 of the Reception Conditions Directive. This principle, which is important for us, must be carefully considered, especially in view of the extended duration of the application of the procedure at the border.
- **Recital 24:** We thank for the clarification regarding the relationship between the registration period and the maximum time limit of 16 weeks. We are critical of the extension of the registration period to up to four weeks with regard to possible irregular secondary movements, and it leads to a further prolongation of the procedure at the border as a whole, up to a maximum of 20 weeks, of which we are also critical. This must be carefully considered.
- **Recital 25:** We welcome the clarification that any violent acts at the border must be avoided at all costs. In view of the principle of non-refoulement and the guarantee of access to asylum, which is made clear in various parts of the proposal (e.g. recital 17, 18 or 20), the monitoring provided for in Article 9 should also keep an eye on compliance with these principles.

Art. 6 ff.

- **Articles 6 to 8:** We thank for the clarification that the proposal is in line with the mandates of Frontex, EUAA and Europol. This could be clarified in the recitals. We welcome that the wording in Articles 6 to 8 will be aligned (“shall provide” instead of “shall prioritise”). We support the proposed measures for targeted support by Frontex, the EUAA and Europol. For the request of the reserve for rapid reaction in Article 6 (1), we kindly ask for the following addition as a clarification: “[...] including, where appropriate, by deploying staff from the 1 500 staff from the Reserve for Rapid Reaction” in accordance with Article 58 (1) of the EBCG Regulation.
- **Article 9:** We welcome the monitoring and review by the Commission provided for in paragraph 3 and refer to our comment on recital 25.

POLAND

General comments:

The Decision will bring an added value for Poland if will foresee article which will allow to temporarily suspend of making of the asylum applications / closing designated places to make applications if in their proximity is a threat for the internal security or public order (e.x. huge groups of migrants assisted by the services of the third country). The proposal was sent as a written comment – „In the event of the probability of the occurrence of threats to national security and public order in the immediate vicinity of the point designated for making an application for international protection, Member States may suspend making the application for international protection in this point.

We have a proposal of the derogation from the art. **14(3)** APD which may be helpful (the possibility to omit the personal interview in well-founded cases in which also subsidiary protection is being granted).

As it was indicated previously we invariably opt for the introduction of solutions proposed independently by PL consisting in:

- a) possibility („may” clause) of indicating/designing points for the purpose of making applications for international protection (including specific border crossing points), providing information about their location, also to migrants attempting to cross the border with Belarus to unlawfully enter EU territory or presenting themselves at border crossing points that have not been designated for this purpose;
- b) possibility („may” clause) for a MS of leaving unexamined/excluding from examination applications made outside of designated points by third country nationals or stateless persons that have been apprehended or found in the vicinity of the border with Belarus after illegally crossing the external border according to the art. 2(2) Schengen Borders Code unless the applicant arrived directly from the territory in which his/her life or freedom was threatened by the danger of persecution or the risk of serious harm, presented credible reasons for illegal entry into the EU territory and applied for international protection immediately after crossing the border;

c) option („may” clause) of suspending the possibility of making the applications for international protection

- in a situation of a threat to security and public order in the vicinity of the point designated for making an application for international protection by third-country nationals and stateless persons;

d) ability („can” clause) to take the necessary measures in accordance with the national law to preserve security, law and order, and ensure the effective application of this Decision

- in the event of violent actions at the external borders, including in the context of attempts by third country nationals to force entry en masse and using disproportionate violent means.

Comments to art. 6-10:

Art. 1 – linguistic comment – it should be „Belarusian” instead of “Belarussian”

Art. 9(1) – **as sent** previously together with LT and LV - LT, LV and PL opt for new wording of the article by inserting into the text the clause about close cooperation among the Commission, relevant European Union agencies and Latvia, Lithuania and Poland and regular informing each other on the implementation of this Decision if only interested MS decided to implement any part of this Decision.

The proposed version:

“The Commission, relevant European Union agencies and Latvia, Lithuania and Poland shall closely cooperate and regularly inform each other on the implementation of this Decision. Latvia, Lithuania and Poland, if decides to implement any part of this Decision, shall continue reporting all relevant data including statistics that are relevant for the implementation of this Decision, via the EU Migration Preparedness and Crisis Management Network”.

Alternatively PL proposed to move this paragraph to the recital.

Art. 9(2)

PL proposes to move this paragraph to the recital as the close cooperation with UNHCR stems from other regulations, i.a. art. 29 APD.

We expect deletion of this para – it duplicates the existing legislation. Maintaining cooperation with UNHCR does not constitute any derogation and is not directly related to the Decision.

Art. 9(3) – as sent previously together with LT and LV - LT, LV and PL opt for deletion of the phrase “as well as any other information the Commission may request” as its scope in the light of the Decision is too broad. Any information requested should be connected with implementation of the Decision or related to situation at border with BY.

Comments to the recitals:

(6) – sent previously together with LT and LV

PL requests for deletion or modification of the sentence “It also responds to a request by the impacted Member States to be able to rely on provisional measures to address the emergency migratory situation at the Union’s external borders effectively”.

In the case of PL which has not implemented border procedures we also cannot speak about current proposal as « the set of measures that equip the Member States concerned with the necessary legal tools to respond rapidly and efficiently to the emergency situation characterised by a sudden inflow of nationals of third countries ». For this reason PL proposed additional solutions that were presented before (point 3).

(10) - sent previously together with LT and LV

PL requests for inserting a phrase which clarifies that the Agencies' support concerns only the needs identified by the MS and in the requested scope.

The agencies can now provide a further step forward in operational support in the necessary scope addressing the needs identified upon the request of the Member State and it is important for the three Member States concerned to make full use of that support.

(14) - sent previously together with LT and LV

We do not agree with the EC's interpretation. We do not record migrants who are "stranded" on our territory, those who cross the border with Belarus contrary to the law are subject to appropriate procedures under national law. Additional, in Polish version of the text « stranded » translated as « utknęli » = stuck. The stay of migrants in guarded centres for foreigners for the duration of the relevant procedures cannot be seen as 'stuck'.

(15) - sent previously together with LT and LV

PL requests to modify the recital.

In the case of PL which has not implemented border procedures we also cannot speak about current proposal as « the set of measures that equip the Member States concerned with the necessary legal tools to respond rapidly and efficiently to the emergency situation characterised by with a sudden inflow of nationals of third countries ». For this reason PL proposed additional solutions that were presented before.

(17) - sent previously together with LT and LV

PL proposed the following wording:

Based on the assessment of the current emergency situation, establishing an emergency migration and asylum management procedure at the external borders, derogating from some of the provisions

of the Asylum Procedures Directive 2013/32/EU and the Reception Conditions Directive 2013/33/EU and the Return Directive 2008/115/EC, is considered the most suited to support the Member States concerned. The emergency migration and asylum management procedure and the operational support measures foreseen in this Decision are tools which may be used by ~~should help~~ the Member State concerned to manage the situation in a controlled and effective way while ensuring full respect for fundamental rights and international obligations as stressed in the European Council call to the Commission. In particular, the measures in this Decision respect the right to asylum by ensuring a genuine and effective access to the procedure and the principle of *non-refoulement*.

The decision is to be effective for three MB, each of which has slightly different national asylum law. The proposed in the Decision tools should not be obligatory but each one. The flexibility in this regard should be ensured.

(20) – new additional comment (in yellow) to the version sent previously together with LT and LV

PL requests for a modification in wording:

To assist the Member States concerned in the orderly management of the flows, under the emergency migration and asylum management procedure, Latvia, Lithuania and Poland may decide, in relation to third country nationals or stateless persons that have been apprehended or found in the vicinity of the border with Belarus after an unlawful entry or after having presented themselves at border crossing points, to make register ~~registration~~ applications for international protection only at specific registration points designated for this purpose which may be situated in the vicinity of the border, which may include specific border crossing points, and provide an effective possibility for lodging an application for international protection only at the specific points that have been designated for such purposes and which should be easily accessible. An effective and genuine access to the international protection procedure must nevertheless be ensured in accordance with Article 18 of the Union Charter of Fundamental Rights. To this end, Latvia, Lithuania and Poland should ensure that sufficient registration points, which may include border crossing points, are designated and open for such purpose. Applicants should be duly informed about the locations where their application will be registered and can be lodged.

The proposed wording is in line with the PL proposal to designate places where asylum applications can be made. Additionally, we opt for flexibility in the matter of their location.

Recital 20 – we do not agree for its deletion. Moreover, as stated previously we expect article in this regard.

(22) - sent previously together with LT and LV

PL supports LT the version: “Latvia, Lithuania and Poland should prioritise the examination of applications of minors and their family members, **as well as applications processing under the Article 33 and 43 of the Asylum Procedures Directive**”.

PL is for deletion of the sentence: “Furthermore, where the state of the health of the applicant does not permit to conduct the examination of the application at the border or transit zones, Latvia, Lithuania and Poland should not apply the border procedure” as it entails the risk of abuse.

(25) - sent previously together with LT and LV

PL is for moving the recital to the normative part of the Decision.

(29) - sent previously together with LT and LV

As the unity in the whole text needs to be ensured we propose the following change of wording:

“Latvia, Lithuania and Poland should inform third-country nationals or stateless persons of applying measures in accordance with this Decision. In particular, in a language which the third-country national or stateless persons understands or is reasonably supposed to understand about the measures applied, the points accessible for registering and lodging an application for international protection, in particular the location of the nearest points where their application can be lodged, the possibility to appeal the decision on the application, and the duration of the measures”.

(31) - sent previously together with LT and LV

PL requests for the change in wording:

“Latvia, Lithuania and Poland may ~~should~~ apply any measures under this Decision(...)”

(32) and (34) - sent previously together with LT and LV

Technical change: EUAA instead of EASO

(32) and (35) - sent previously together with LT and LV

Technical change: the European Union Agency for Law Enforcement Cooperation (Europol)

Comments received following the JHA Counsellors meeting on 26 January 2022

1. PL would like to thank Presidency for the preparation of the new text of the Decision. PL is satisfied with many improvements in line with our comments to the Commission’s proposal.
2. PL supports the wording indicating that:
 - The MS concerned decides on the implementation of the temporary measures / derogations;
 - the operational support of the agencies is provided upon request of the MS concerned;
 - the scope of the decision are third country nationals and stateless persons but not Belarusian citizens seeking international protection within the EU.

3. We do not object to leaving in the Council decision only solutions relating to the asylum acquis (which are crucial, according to CLS opinion), but in such a situation we see the need to take into account our expectations on the effective measures in the Schengen Borders Code in order to better protect the external borders with regard to instrumentalization of migrants.
4. PL is of the opinion that the Council decision would have added value for PL if it had taken into account the postulate that making of asylum applications may be suspended in the event of a (probable) threat to national security and public order in the vicinity of the designated points for making asylum application, in accordance with the previously proposed provision: „In the event of the probability of the occurrence of threats to national security and public order in the immediate vicinity of the point designated for making an application for international protection, Member States may suspend making the application for international protection in this point”.

We are aware that this is a far-reaching change, but from our point of view this solution is extremely important in the situation of a hybrid attack from the side of a hostile regime.

5. We also request for deletion of art. 9(2) as it duplicates the already existing provisions. Moreover, it should be noted that maintaining cooperation is not a derogation and is not related to the Decision. Alternatively, we opt for modification of this paragraph and moving it to the recitals.
6. Moreover, we would like to propose an additional provision concerning the derogation from art. 14 of Directive 2013/32/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on common procedures for granting and withdrawing international protection (recast): where the determining authority is able to take a positive decision with regard to granting subsidiary protection on the basis of the available evidence. Such a derogation would make it possible to shorten all the procedures in which it is possible to issue a positive decision in cases related to applications for international protection. Under the current law, such a withdrawal is possible when the determining authority is able to make a positive decision with regard to granting the refugee status on the basis of the available evidence. We propose to extend this exception also to procedures in which decisions on granting subsidiary protection are issued. As a rule, foreigners who

receive subsidiary protection do not appeal to the second instance authority, which proves that in most cases subsidiary protection is a form of protection that satisfies them.

7. We are in favor of maintaining the recital 20 indicating the possibility for interested MS to specify places for lodging and registering applications for international protection, which is in line with PL's postulate to introduce a provision allowing for indicating places to make such applications. Nevertheless, we understand the CLS' and EC's explanations pointing to the flexibility for MS in designating such sites, and the fact that it is already foreseen in the APD.
8. Regarding recital 25, PL remains of the opinion that this recital should be reflected in the normative part of the Council Decision.

PORTUGAL

PT reiterates its opposition to the instrumentalisation of migrants for political purposes, and considers important that the EU stands together and acts in a coordinated matter in regard to this matter. Therefore, we would like to thank the COM for presenting the current proposal for the benefit of Latvia, Lithuania and Poland and discussing it in the AWP.

Articles 6, 7 and 8

We consider the role played by the EU agencies is crucial and we can support these articles in general terms. We question the different drafting between article 6 and articles 7 and 8, namely “shall provide or increase” and “shall prioritise making available”, suggesting its alignment.

Recitals

(24) In line with our drafting suggestion for Article 2, we propose that “and other vulnerable persons” is added at the end of this recital.

SWEDEN

Thank you for the opportunity to comment in writing on the discussed Articles (6-10) and recitals of the proposal for a Council decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland. Sweden welcomes in principle that the Commission has put forward measures to address the situation at the EU's external border. However, Sweden still has a general scrutiny reservation to the proposed text. Since we still lack a national position on the matter, kindly note that our comments are preliminary at this stage, and that we may submit further comments later.

Article 10.4 – Entry into force and application

Sweden thinks that paragraph 4 needs some clarification regarding the temporal scope, especially since it is now stated in the paragraph that the Council decision shall continue to apply after the expiry of that decision and until the third country nationals concerned are returned. Under Article 78(3) TFEU, only ‘provisional measures’ may be adopted. Since the proposed measures with the possibility to make derogations from the common asylum- and return legislation are extraordinary in nature and aim at addressing an exceptional situation, these provisional measures should be clearly limited in time and to what is strictly necessary. In view of this and in particular the extensive possibilities to derogate from the Return Directive provided for in the proposal, legal certainty and transparency are essential.

Recitals

Recitals 3–14

The use of the proposed emergency measures by means of a proposal for a Council Decision under Article 78(3) TFEU must be clearly justified. As stated during the meeting, Sweden therefore thinks that the recitals need to be updated in order to properly reflect the situation of instrumentalisation of migrants at the external borders to Belarus at the time of the adoption of the Council decision.

Recital 15

The wording of recital 15, which states that the provisional measures may include **all** measures necessary to respond effectively and swiftly to the current attack, might give the wrong impression that the emergency measures may go beyond the measures in the proposal.

Recital 23

The wording of the last two sentences of recital 23 needs some clarification. As it now stands, it could be interpreted that the guarantees in connection to detention in the Reception Conditions Directive, including the general principles of necessity and proportionality reflected in the Directive, should apply to a lesser extent to categories of asylum seekers other than minors and their families, which is not the case. The principles of proportionality and necessity applies to all categories of asylum seekers in general, without exception. I.e. less coercive alternatives to detention should always be considered by the authorities. The current wording might therefore cause some confusion in this regard.